IN THE

Supreme Court of the United States

October Term, 1958

No. 85

LLOYD BARENBLATT,

Petitioner,

v.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84

WILLARD UPHAUS,

Appellant,

v.

LOUIS C. WYMAN, Attorney General, State of New Hampshire,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF NEW HAMPSHIRE

BRIEF OF NATIONAL LAWYERS GUILD AS *AMICUS CURIAE*

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The Interest of the National Lawyers Guild

This brief is filed with the written consent of all parties to these cases. The National Lawyers Guild solicited this consent because of its concern, as a national bar association, with the preservation of the constitutional rights

of the people against governmental encroachment. In its view the present cases are significant because their decision may determine whether, as appeared indicated by *Watkins* v. *United States*, 354 U. S. 178, and *Sweezy* v. *New Hampshire*, 354 U. S. 234, the end is in sight to the unprecedented (354 U. S., at p. 195) era of inquisition into thoughts and associations in ways boldly adapted from the Star Chamber and Court of High Commission by the Dies Committee in the late 1930's and since carried forward by certain Congressional committees and other inquisitorial bodies.

The National Lawyers Guild believes that such bodies are in fundamental conflict with the Constitution in their disregard of the inviolability of ideas and peaceful associations, for their basic assumption appears to be that security and freedom are inherently incompatible, that the demands of security are paramount and, thus, that the road to security lies through repression.

The product of this assumption has been the technique of public exposure as a means of suppressing the ideas of which these bodies do not approve. Often there is no possible purpose to their activities except the instigation of black-lists, reprisals, and public hostility, of which these bodies then make pious disclaimer. See *Watkins* v. *United States*, 354 U. S., at p. 198. Cf. *N. A. A. C. P.* v. *Alabama*, 357 U. S. —, 2 L. ed. (2) 1488.[1]

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[1] One of the results of the continued activity of Congressional and state bodies investigating the political and social beliefs of witnesses has been the establishment, in several Southern states, of state committees investigating the activities of the National Association for the Advancement of Colored People and of Negro and white supporters of this Court's desegregation decision in *Brown* v. *Board of Education*, 347 U. S. 483 (1954). This problem is now before this Court in the case to be argued with *Uphaus, Scull* v. *Virginia ex rel. Committee on Law Reform and Racial Activities*. And see Robison, *Protection of Associations from Compulsory Disclosure of Membership*, 58 Col. Law Rev. 614, 615-19 (May 1958).

There is scarcely any phase of the intellectual and cultural life of America which these bodies have considered beyond their reach, whether in politics, science, religion, philosophy, music, painting, literature, education, entertainment, or the professions. They have self-construed their vague grants of authority as sufficiently broad to permit investigation of any and every kind of organizational relationship, whether fraternal, social, political, economic, educational, or otherwise, and of every kind of propaganda, including limitless inquiries into any and all ideas, opinions, beliefs and associations and any and all individuals and organizations. Their main interest has been "names" and they themselves have asserted, established and determined the pertinency of their questions in their pursuit of "Un-American" and "subversive" persons and propaganda.

The effects of the committees' activities as an impediment to free expression and to free association in our country [2] have been recognized by the National Lawyers Guild and others from the inception of these bodies. Their procedures, which readily accept hearsay, hearsay on hearsay, unsubstantiated gossip and unqualified opinion and which deny the basic rights of confrontation and cross-examination, the effective aid of counsel, and the right to produce and to compel the production of evidence, lend themselves easily to smear and to the destruction of careers and reputations without any of the traditional and historic safeguards of due process.

[2] The petitioner and appellant in the present cases are persons whose occupations deal with ideas, the one a college teacher and the other a philosopher and religious thinker. Of the many Americans who have refused to answer questions put to them by such committees, thirty who based their refusals on pertinency or First Amendment grounds were prosecuted for contempt. Aside from the petitioner and appellant these defendants included eight college professors, one public school teacher, one playwright, two attorneys, four newspapermen, two radio announcers, two union organizers, a librarian, two actors, one folk singer, and one engineer. (Cases listed and described in the *Civil Liberties Docket*, Volumes II and III, at #271 [National Lawyers Guild].)

Watkins and *Sweezy*, by restating "several basic premises on which there is general agreement" (*Watkins* v. *United States*, 354 U. S., at pp. 187-8) projected the hope that these activities would be brought to an end as the Constitution requires that they should. For the limitations which our constitutional scheme of government imposed upon such legislative sponsored investigations were thus summarized:

> "• • • There is no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress. This was freely conceded by the Solicitor General in his argument of this case. Nor is the Congress a law enforcement or trial agency. These are functions of the executive and judicial departments of government. No inquiry is an end in itself; it must be related to and in furtherance of a legitimate task of the Congress. Investigations conducted solely for the personal aggrandizement of the investigators or to 'punish' those investigated are indefensible.
>
> "• • • The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged." (354 U. S., at pp. 187-8).

> "We have no doubt that there is no congressional power to expose for the sake of exposure. The public is, of course, entitled to be informed concerning the workings of its government. That cannot be inflated into a general power to expose where the predominant result can only be an invasion of the private rights of individuals." (*Id.*, at p. 200).

Yet in these and the other (*Flaxer* v. *United States*, 354 U. S. 929; *Sacher* v. *United States*, *ibid.*; see also — U. S. —, 2 L. ed. (2) 987) cases remanded for reconsideration in the light of *Watkins* the courts below decided the issues in terms of the validity of the actions of the committee and

of the attorney general within the scope of their enabling resolutions. But in so doing, it seems to us, they erroneously passed over and assumed the constitutional validity of the resolutions themselves (see Judge Fahy's dissent in the opinion on the remand, joined in by Chief Judge Edgerton and Judge Bazelon in *Flaxer* v. *United States*, — F. (2) —, at p. —, slip opinion, pp. 3-4 [C. A. D. Col., No. 12027, April 3, 1958]).

In view of the narrow grounds of these holdings that the convictions are unaffected by *Watkins* and *Sweezy*, the National Lawyers Guild believes that the issues transcend the interest of these cases or of the particular petitioner and appellant, for they relate to whether the restatement of fundamental principles in *Watkins* and *Sweezy* marked a return to historic concepts of freedom in America or whether these principles are to be vitiated by a grudging application and narrow construction.

For no less than the weight and sanctity of the Court's trusteeship of the Bill of Rights is involved.

Introduction

In *Barenblatt* the alleged contempt of the Committee consists of the refusal of the petitioner to confirm or deny the testimony of a preceding witness that, while a graduate university student, he had been a member of a Marxist discussion group. In *Uphaus* the alleged contempt is in appellant's refusal to produce a list of guests at the summer camp of World Fellowship and correspondence with and concerning guest lecturers at the camp.

The National Lawyers Guild believes that there is no room under the Constitution, in *Barenblatt*, for a legislative interest in confirming, by exacting an admission, a particular university student's membership in a Marxist discussion group or, in *Uphaus*, for a state interest in compelling the production of a list of guests and lecturers

at a summer camp which seeks to bring together "for fellowship and discussion the representatives of all faiths to the end that there may be peace, brotherhood and plenty for all men, women and children." (*Uphaus* Petition, p. 18).

In our view the starting point for discussion is the command of the First Amendment that Congress shall make "*no* law" abridging speech, press or association. This would exclude Congress from the area of ideas and opinion, including peaceful political, intellectual, cultural or economic associations.

If it were assumed that there is still an allowable area for legislative action despite the sweep of the First Amendment and the reservation of non-delegated rights to the people by the Ninth and Tenth Amendments, then a definitive instruction to the agent from the principal, Congress, narrowly limiting the agent within the permissible bounds is constitutionally necessary. A general grant of power to investigate "subversive" or "Un-American" propaganda or activity is so hopelessly vague as to deny the possibility of an effective criterion for pertinence, and hence as a guide to the witness or as a standard for judicial review. Therefore in our view there is no power to subpoena because the grant of power is void for vagueness. Cf. *Winters* v. *New York*, 333 U. S. 507; *Lanzetta* v. *New Jersey*, 306 U. S. 451.

We believe that the issues are controlled by the Bill of Rights and not by a committee or staff member's elastic and *ad hoc* rationalizations of pertinency, or the clarity of a direction to answer, important as those issues are. For unless the Constitution controls over the committees' ever-expanding constructions of pertinency through free-wheeling lines of inquiry, the inherent vice of their enabling resolutions will ever continue to act as a pervasive restraint upon freedom of expression and association and as a trap for the witness who can determine the pertinency of a question only by jeopardizing his liberty in a prosecution for criminal contempt.

ARGUMENT

POINT I

The resolutions creating the House Committee and establishing these investigative functions of the New Hampshire Attorney General are both unconstitutional and void as abridgements of freedom of speech and assembly in violation of the First Amendment and, in *Upthaus*, the Fourteenth Amendment.

A. The House Committee Resolution Is a Pervasive Restraint Upon First Amendment Freedoms.

> "* * * Clearly, an investigation is subject to the command that the Congress shall make no law abridging freedom of speech or press or assembly. While it is true that there is no statute to be reviewed, and that an investigation is not a law, nevertheless an investigation is part of lawmaking. It is justified solely as an adjunct to the legislative process. The First Amendment may be invoked against infringement of the protected freedoms by law or by lawmaking." *Watkins* v. *United States, supra,* at p. 197.
>
> "The Bill of Rights is applicable to investigations as to all forms of government action." (Id., at p. 187.) See also *United States* v. *Rumely,* 345 U. S. 41; *United States* v. *Harris,* 347 U. S. 612.

The resolution on its face and as it has been consistently applied, including its application here to a Marxist discussion group, abridges the freedom of speech, discussion and political expression which is protected against governmental invasion by the First Amendment, since it is upon the unabridged exercise of these rights that free government depends. *De Jonge* v. *Oregon,* 299 U. S. 353; Cf. *Terminiello* v. *City of Chicago,* 337 U. S. 1; *Thomas* v. *Collins,* 323 U. S. 516; *Schneiderman* v. *United States,* 320 U. S. 118; *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296; *Schneider* v. *State,* 308 U. S. 147; *Herndon* v. *Lowry,* 301 U. S. 242.

As Judge Edgerton noted in his dissent in *Barsky* v. *United States*, 167 F. (2d) 241, 255:

> "That the committee's investigation does in fact restrict speech is too clear for dispute. * * *
>
> "The effect is not limited to the people whom the Committee stigmatizes or calls before it, but extends to others who hold similar views and to still others who might be disposed to adopt them. It is not prudent to hold views or to join groups that the Committee has condemned. People have grown wary of expressing any unorthodox opinions. No one can measure the inroad the Committee has made in the American sense of freedom to think. There has been some suggestion that it restrains only timid people. I think it nearer the truth to say that, among the more articulate, it affects in one degree or another all but the very courageous, the very orthodox, and the very secure."

The peculiar characteristic of the functioning of this Committee, as the facts here show, is the exercise of the power of inquiry for purposes of exposure and harassment rather than for legislation.

The power to investigate is not an express, but an implied power. Therefore when investigation is attempted by Congress the inquiry is "whether it is properly an incident to an express power and necessary to its execution. If it be, then it may be executed by Congress. If not, Congress cannot exercise it." *United States* v. *Harris*, 106 U. S. 629, 636. Were it otherwise, the question of the assertion of the power to investigate or the use of implied powers as ends in themselves would effectively nullify all constitutional limitations on Congressional jurisdiction. *Carter* v. *Carter Coal Co.*, 298 U. S. 238, 291; *United States* v. *Butler*, 297 U. S. 1, 64; *Kansas* v. *Colorado*, 206 U. S. 46, 81.

Congress not only lacks express power to legislate on peaceful speech and association, but it is expressly barred from doing so. For the command of the Constitution is that as to *all* speech Congress shall pass "*no* law" regulating content. Yet, since the terms of the resolution are so broad that their meaning can only be established by the opinions and prejudices of those applying them, they operate as a restraint upon all speech and associations.

A statute which invades protected liberties can be sustained, if at all, only if it is narrowly drawn to deal with the precise evil which may be and is sought to be curbed. *Schneider* v. *State, supra*; *Cantwell* v. *Connecticut, supra*; *De Jonge* v. *Oregon, supra*. It is impossible to discern any substantive evil, other than the conflict of ideas, to which the resolution is addressed. Cf. *Thornhill* v. *Alabama, supra; Winters* v. *New York, supra; Stromberg* v. *California*, 283 U. S. 359, 369; *Herndon* v. *Lowry, supra*, at 258. See Freund, *The Supreme Court and Civil Liberties*, 4 Vanderbilt Law Rev. 353, at 510 (1951).

Furthermore, vagueness is more objectionable in this area than in ordinary criminal statutes for a vague restraint upon civil liberties exerts an intimidating effect on speech generally and permits discriminatory application. *Lovell* v. *Griffin*, 303 U. S. 444.

A declaration of the invalidity of the Resolution underlying the Committee's limitless intrusions into First Amendment freedoms is thus the necessary means of ending them.

B. The Resolution Establishing the Power of Compulsory Process in the New Hampshire Attorney General to Investigate Into the Presence of "Subversive" Persons is Equally Void.

> . . . It is particularly important that the exercise of the power of compulsory process be carefully circumscribed when the investigative process tends to impinge upon such highly sensitive areas as free-

dom of speech or press, freedom of political association, and freedom of communication of ideas, particularly in the academic community. Responsibility for the proper conduct of investigations rests of course, upon the legislature itself. If that assembly choose to authorize inquires on its behalf by a legislatively created committee, that basic responsibility carries forward to include the duty of adequate supervision of the actions of the committee. This safeguard can be nullified when a committee is invested with a broad and ill-defined jurisdiction."

Sweezy v. *New Hampshire, supra,* at p. 245.

Despite the foregoing considerations the breadth and scope of the New Hampshire resolution is so extensive that:

"* * * the basic discretion of determining the direction of the legislative inquiry has been turned over to the investigative agency. The Attorney General has been given such a sweeping and uncertain mandate that it is his decision which picks out the subjects that will be pursued, what witnesses will be summoned and what questions will be asked. * * *

"Instead of making known the nature of the data it desired, the legislature has insulated itself from those witnesses whose rights may be vitally affected by the investigation. * * *

"* * * Separating the wheat from the chaff, from the standpoint of the legislature's object, is the legislature's responsibility because it alone can make that judgment. In this case, the New Hampshire legislature has delegated that task to the Attorney General.

"As a result neither we nor the state courts have any assurance that the questions petitioner refused to answer fall into a category of matters upon which the legislature wanted to be informed when it initiated this inquiry. * * *" (*Id.*, at pp. 253-4).

As a result of the inability to ascertain whether the questions relate to the legislature's area of interest it is impossible to determine whether the legislative interest is of sufficient importance to justify the infringement occasioned by the inquiry.

"* * * The lack of any indications that the legislature wanted the information the Attorney General attempted to elicit from petitioner must be treated as the absence of authority. It follows that the use of the contempt power, notwithstanding the interference with constitutional rights, was not in accordance with the due process requirements of the Fourteenth Amendment." *Supra*, at pp. 254-5.

Therefore the effect of the resolution is to place freedom in jeopardy, for the conviction ignores these words in *Sweezy* (at pp. 250-1):

"Notwithstanding the undeniable importance of freedom in the areas, the Supreme Court of New Hampshire * * * found such justification in the legislature's judgment, expressed by its authorizing resolution, that there exists a potential menace from those who would overthrow the government by force and violence. That court concluded that the need for the legislature to be informed on so elemental a subject as the self-preservation of government outweighed the deprivation of constitutional rights that occurred in the process.

"*We do not now conceive of any circumstances wherein a state interest would justify infringement of rights in these fields*" (emphasis supplied). (*Id.*, at pp. 250-1).

POINT II

Neither the Committee nor the Attorney General has power to issue subpoenas.

The power to compel testimony under the impress of criminal sanctions makes greater the need for clarity and therefore emphasizes the vice of vagueness in the enabling resolutions.

Those summoned before the Committee or the Attorney General need answer only pertinent questions. *Sinclair* v. *United States*, 279 U. S. 263. Criminality of the refusal to

testify depends upon pertinency. The witness is therefore entitled to a clear frame of reference to determine pertinency, as the accused in any criminal case is entitled to the "explicitness and clarity that the Due Process Clause requires in the expression of any element of the criminal offense." 354 U. S., at p. 209.

The House Resolution provides no clue to pertinency. The only visible test for pertinency is the agility with which the Committee spokesmen devise *ad hoc* justifications for their inquiries under the unlimited scope of the enabling resolution. See *United States* v. *Reese*, 92 U. S. 214; *Cline* v. *Frank Dairy Co.*, 274 U. S. 445; *Winters* v. *New York, supra.*

Neither Congress nor the New Hampshire legislature have given to their grants of power that "measure of added care" which is necessary where the grant is of "compulsory process that gives rise to a need to protect the rights of individuals against illegal encroachment." 354 U. S., at p. 215.

Therefore neither the Committee nor the Attorney General has the power to issue subpoenas to compel testimony, since there is no adequate guidance nor ascertainable standards to determine pertinence.

Conclusion

Under our constitutional system this Court stands "against any winds that blow." *Chambers* v. *Florida*, 309 U. S. 227, 241. The Court, it has declared, will not permit its claim to guardianship of "free speech to become a hollow one." (*Thomas* v. *Collins, supra*, at 517.) For under our system of government the remedy for these invasions is with the courts. *West Virginia* v. *Barnette*, 319 U. S. 624, 638. Thoughtful citizens have long expressed

deep concern as to the inquisitional practices of such bodies (Commager, *Who Is Loyal to America*, Harper's Magazine (September, 1947); Note, 14 University of Chicago Law Review 416; Gellhorn, *Report on a Report of the House Committee on Un-American Activities*, 60 Harvard Law Review 1193; Barth, *The Loyalty of Free Men* (1951); Biddle, *The Face of Freedom* (1951); Carr, *The House Committee on Un-American Activities* (1952); Gossett, *Are We Neglecting Constitutional Liberty? A Call to Leadership*, 38 American Bar Association Journal 817; *Letter to The President by Members of Yale Law Faculty*, 4 American Bar Association Journal 15, 16). This concern should be allayed and the traditional concept that the First Amendment protects the privacy of the people from governmental inquisition into their views, beliefs and associations should be restored.

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